

Procedural Safeguards for Children and Parents

as required by The Individuals with Disabilities Education Act (IDEA)
Amendments of 2004

Written Notice and Consent

You must be given written notice a reasonable time before the agency*: (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. This notice will include the following information: (1) a description of the action proposed or refused, and an explanation of why the agency proposes or refuses to take the action, (2) a description of any other options the [district] IEP team considered and the reasons why any of those options were rejected, (3) a description of each evaluation procedure, [test] assessment, record, or report the agency used as a basis for the proposal or refusal, (4) a description of [any] other factors relevant to the proposal or refusal, [and] (5) a statement that the parents of a child with a disability have procedural safeguards protection and if this notice is not an initial referral for evaluation the means by which a copy of the description of the procedural safeguards can be obtained[;], and (6) sources for parents to contact to obtain assistance in understanding their procedural safeguards.

In addition, the notice must be written in language understandable to the general public, in language you understand and provided in your native language or your primary mode of communication unless it is clearly not feasible.

If your native language or primary mode of communication is not a written language, the agency must document what steps were taken to insure that the notice was translated orally or by other means to you in your native language or primary mode of communication, and that you understand the content of the notice. The agency will have to document in writing that this notice was provided.

A copy of the procedural safeguards shall be given to you, [at a minimum] **one time a year, except that a copy shall also be given:** (1) upon initial referral for evaluation; (2) upon [notification of individualized education program (IEP) meetings] **the first occurrence of the filing of a due process hearing request;** (3) upon [reevaluation of your child] **your request;** and (4) upon [request for a due process hearing] **disciplinary removal for drugs, weapons, or serious bodily injury.**

The agency must obtain your written consent before conducting an evaluation or the initial provision of special education and related services to a child with a disability. Consent for initial evaluation may not be construed as consent for initial placement. Reviewing existing data as part of evaluation or reevaluation and subsequent placements do not require consent and consent for additional testing need not be obtained if the agency can demonstrate that it had taken reasonable measures to obtain your consent and you failed to respond. "Reasonable measures" include a minimum of two attempts documented such as: detailed records of telephone calls made and the results of those calls; copies of correspondence sent to you and responses received; and detailed records of visits to your home or work place and the results of those visits. In order to obtain your consent, the agency will make every effort to explain its position and hear your concerns. Your consent is not required before administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

If you refuse consent for initial evaluation or reevaluation, the agency may continue to pursue those evaluations by using the due process hearing procedures or mediation procedures.

An agency may not use your refusal to consent to one service or activity to deny you or your child any other service, benefit, or activity of the agency.

“Consent” means that: (1) you have been fully informed of all information relevant to the activity for which consent is sought, in your native language, or other mode of communication; (2) you understand and agree in writing to the carrying out of the activity for which your consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and (3) you understand that the granting of consent is voluntary on the part of the parent and may be revoked at any time. If you revoke consent, that revocation is not retroactive.

“Evaluation” means procedures used to determine whether a child is disabled and the nature and extent of the special education and related services that the child needs to be involved in and progress in the general curriculum. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

Independent Evaluation

You have a right to an independent educational evaluation at public expense if you disagree with the evaluation conducted by the agency. An “independent educational evaluation” means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. “Public expense” means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. The agency must provide you[, if you request it,] information about where independent educational evaluations may be obtained. The agency may initiate a hearing to show that the agency’s evaluation is appropriate (see “Due Process Procedures”). If the agency does initiate such a hearing and the hearing decision is that the evaluation is appropriate, you still have the right to an independent evaluation, but not at public expense.

You may obtain an independent evaluation without notifying the agency of your disagreement. A copy of your agency’s policy regarding independent evaluations (if one exists) will be provided to you upon request. Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the agency uses when it initiates an evaluation to the extent those criteria are consistent with the parent’s right to an independent evaluation. Except

for those criteria, the agency may not impose any other conditions or timelines. If you request an independent evaluation, the agency may ask you why you object to the agency’s evaluation. However, the agency may not require an explanation and may not unreasonably delay either providing the independent evaluation at public expense or initiating a due process hearing to defend the agency’s evaluation. The agency will respond to any independent evaluation and consider it in any decision made with respect to the identification, evaluation, or placement of your child, or the provision of a free [and] appropriate public education for your child. The agency is required to consider the independent evaluation information but it is not obligated to modify your child’s program/placement based on the contested portions. Whether your child’s program/placement should be modified based on the independent evaluation, is an IEP team decision. Results of this evaluation may be presented as evidence at any hearing regarding your child. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

If you obtain an independent evaluation at private expense, the results of the evaluation must be considered by the agency, if it meets agency criteria, in any decision made with respect to the provision of a free appropriate public education to your child, and may be presented as evidence at a due process hearing.

Access to Records

You have the right to inspect and review all of the records[.] collected, maintained, or used by the agency regarding your child and to have them clearly explained to you. You have the right to obtain copies of the records if failure to provide copies effectively prevents you from exercising your right to inspect and review them. The agency may charge a fee for copies of the records if the fee does not prevent you from inspecting and reviewing the records. The agency may not charge a fee to search for or to retrieve information regarding your child. You also have the right to have your representative inspect and review the records. Additionally, the agency must presume that you have authority to inspect and review records relating to your child unless the agency has been advised that you don’t have the authority under applicable state law governing such matters as guardianship, separation, and divorce.

The agency shall comply with a request to access records without unnecessary delay and before any meeting regarding an individualized education program

or hearing related to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

Confidentiality of Information

Information collected, maintained, or used by the agency regarding your child must be kept confidential. You have the right to request a list of the types and locations of your child's educational records and a list of any parties who have accessed information in that record. The agency must keep a record of parties obtaining access except access by parents and authorized employees of the agency, including the name of the party, the date of access, and the purpose for the access. The agency must maintain, for public inspection, a current listing of the names and positions of the authorized employees. If any record includes information on more than one child, you have the right to inspect and review only that information which relates to your child.

Information will be maintained and released in accordance with the regulations in the Family Educational Rights and Privacy Act (FERPA) of 1974 and the agency may not disclose, without your consent, information from your child's records unless authorized to do so under the FERPA regulations. Your consent must be obtained before such information is disclosed to anyone other than officials of participating agencies collecting or using such data or used for any purpose other than meeting a requirement under IDEA. If you refuse to give your consent the agency may invoke due process hearing procedures. If your failure to give consent constitutes neglect under Missouri's Child Abuse and Neglect Laws, the agency shall report same to the proper authorities. The agency is not required to obtain your written consent before records are released to an agency to which you plan to transfer your child, to officials in your agency if they need them for educational reasons, or to officials of the Missouri Department of Elementary and Secondary Education. Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding the state's policies and procedures on protection of confidentiality. If you believe that information in these records is inaccurate or misleading, or violates the privacy or other

rights of your child, you may request that the agency amend the information. The agency must decide whether to amend the information within a reasonable period of time. You will be informed of that decision and the agency shall advise you of the right to a hearing. The agency, upon your request, will provide an opportunity for a hearing to challenge information in the educational records. This type of hearing is conducted according to procedures under the Family Educational Rights and Privacy Act (FERPA) at 34 C.F.R. 99.22, not under the special education due process hearing system. If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it will amend the information accordingly and inform you in writing.

If the agency decides not to amend the information, it will inform you of the right to place a statement in the record documenting on the information or giving reasons for disagreeing with the agency's decision. This explanation must be maintained by the agency and if the information is disclosed to any party, the explanation must also be disclosed.

All rights of privacy and educational records indicated herein with regard to parents shall pass to the child upon reaching age 18, except in the case of a child with a disability who is legally determined to be incompetent to make such decisions for himself/herself and for whom legal guardianship or conservatorship is required beyond the age of 18. In those instances, the legally established guardian or conservator shall maintain the rights to privacy as outlined above. The parent and child will be notified of the transfer of rights.

The agency is to include in the child's records a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child. If the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

Destruction of Records

The agency must inform you when personally identifiable information collected, maintained, or used, is no longer needed to provide educational services. "Personally identifiable" means that information includes: the name of the child, the child's parent, or other family member; the address of the child; a personal identifier, such as the child's social security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty. You have the right to request that information maintained or used by the agency regarding your child be destroyed [five] **three** years after it is no longer needed to provide educational services. Be aware, however, that the information may be needed at some time for Social Security benefits or other services. The agency may maintain a permanent record of a student's name, address and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed.

Parent Participation

You will be given an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of your child and the provision of a free appropriate public education.

Mediation – Prior to Filing a Due Process Hearing Request

Mediation is available at no charge to resolve matters arising prior to the filing of a due process hearing request. See Impartial Due Process Hearings section for further information of mediation process and procedures. Mediation may be requested by sending a written request to the Missouri Department of Elementary and Secondary Education:

**MO DESE
Attention: Legal Section/Special Education
P.O. Box 480
Jefferson City, MO 65102
Fax: (573) 526-4404**

In response, DESE will notify the agency that you are interested in mediation, and you and the agency will be provided mediator information to consider.

Discipline

1. Ten school days or less: Your child may be removed from [his] **their** current placement for ten school days or less by the agency, to an appropriate interim alternative educational setting, another setting, or suspension without providing services, unless the conduct involves drugs [or], weapons, **or serious bodily injury** in which case the change may be for 45 **school** days and would require services in an alternative setting as explained below or the conduct involved is unrelated to your child's disability, in which case the change may involve a long-term suspension or expulsion and would require services in an alternative setting as explained below.
2. 45 **school** days: Your child's placement may be changed to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but not for more than 45 **school** days, **unless the student's conduct is unrelated to their disability**; if your child possessed a dangerous weapon at school or to a school function or your child knowingly possessed or used illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function **or inflicted serious bodily injury while at school, on school premises, or at a school function**. On the date on which the decision to take action is made, you must be notified of the decision and provided the Procedural Safeguards statement.
- [3. Behavioral Assessment: On or before the end of the tenth business day of a disciplinary action which for the first time that school year exceeds 10 days cumulatively, if the agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the discipline action, the agency must convene an IEP meeting to develop an assessment plan to address that behavior. If your child already has a behavioral intervention plan, the IEP team shall review the plan and modify it, as necessary, to address the behavior involved in the disciplinary action. If your child does not already have such a plan, the IEP team shall develop one and shall implement those interventions. Any subsequent removals, which do not constitute a disciplinary change of placement, require that the IEP team review the behavior intervention plan and its implementation to determine if modifications are necessary. If one or more of the IEP team members believe that

modifications are needed, the team shall meet to modify the plan and its implementation, to the extent the team determines necessary.]

3. Access to Services: Any interim alternative educational setting determination involving a long-term suspension or disciplinary change of placement shall be made by the IEP team, must be selected to enable your child to continue to participate in the general curriculum, **although in another setting,** and to **[continue to]** receive **as appropriate, a functional behavioral assessment, behavior intervention plan and services and modifications** required by the IEP, **[and must include]** **including** services and modifications **[designed to]** **that will enable the child to progress toward meeting the goals of the IEP and** address the behavior involved in the disciplinary action so that it does not recur. Services for short-term suspensions which exceed 10 days cumulatively are only required if the agency determines this necessary for the child to appropriately progress.

4. Manifestation Determination: Immediately, if possible or at the same time the IEP team meets to address functional behavioral assessment and behavior intervention plan, but no later than ten school days after the date on which the decision to implement a disciplinary change of placement (long-term removal such as removal in excess of 10 consecutive days, or series of removals in excess of 10 days cumulatively where a pattern has been created due to the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another), the **agency, you, and other relevant members of the IEP team [and other qualified personnel]** shall determine **[whether there is a relationship between the child's disability and the behavior subject to the disciplinary action] if the conduct in question was caused by, or had a direct and substantial relationship to the child's disability or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.** If the conduct is determined unrelated to your child's disability, disciplinary procedures applicable to children without disabilities may be applied to your child in the same manner in which they would be applied to children without disabilities. However, in that event your child must still receive a free appropriate public education. If the agency initiates disciplinary procedures applicable to all children, the special education and

disciplinary records of the child shall be transmitted for consideration by the person or persons making the final determination regarding the disciplinary action. If you disagree with a determination that your child's behavior was not a manifestation of his disability, or with any decision regarding placement in a disciplinary situation involving a disciplinary change of placement (long-term suspension), you have the right to request an expedited due process hearing. **[The IEP team may determine that the behavior of the child was not a manifestation of the child's disability only if the IEP team first considers all relevant information, including evaluation and diagnostic results (including results or other relevant information provided by you), observations of the child, the child's IEP and placement, and then determines that:**

- the IEP and placement were appropriate and special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement
- the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to the disciplinary action
- the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

In the absence of any of these factors being considered or determinations made, the IEP team must consider the behavior a manifestation of his disability. If the team identified deficiencies in the child's IEP or placement or in the implementation, it must take immediate steps to remedy those deficiencies.

In reviewing a manifestation determination decision, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the listed factors being considered and the listed determinations being made.]

If the conduct is determined to be a manifestation of the child's disability, the IEP team shall conduct a functional behavioral assessment, and implement a behavioral intervention plan for such a child, provided that the agency had not conducted such assessment

prior to such determination before the behavior that resulted in a disciplinary change of placement; if a behavioral plan has already been developed, the IEP team shall review it and modify it, as necessary, to address the behavior. If the conduct was a manifestation of the disability, no disciplinary change of placement, other than for drugs, weapons or serious bodily injury, may result.

5. Dangerous Students: If the agency believes your child will injure himself or others, the agency has the right to obtain an expedited due process hearing to seek a 45 **school** day interim alternative educational setting. You must be notified of the decision to seek this order on the day the decision is made and provided the procedural safeguards statement. At that hearing, the hearing officer may order a change in placement to an appropriate interim alternative educational setting for not more than 45 **school** days if the hearing officer[:] determines [the agency has demonstrated by substantial evidence (i.e. beyond a preponderance of the evidence)] that maintaining the current placement of such child is substantially likely to result in injury to your child or others[:].

- [• considers the appropriateness of your child's current placement;
- considers whether the agency has made reasonable efforts to minimize the risk of harm in the child's current placement including the use of supplementary aids and services; and
- determines that the interim alternative educational setting enables your child to continue to progress in the general curriculum and continue to receive services required by his current IEP.]

This procedure may be repeated as necessary, **and in no way limits the agency's right to seek a court injunction.**

6. "Stay-put" under disciplinary actions: If you request a due process hearing regarding the discipline action to challenge the [interim alternative educational setting] **disciplinary change of placement** or the manifestation determination [and when your child is disciplined for weapons, drugs, or because they are a danger to themselves or others,] your child will remain in that [interim alternative] educational setting pending the hearing decision or until expiration of the time period of the [interim alternative educational setting] **disciplinary change**

of placement, whichever comes first (unless the parties agree otherwise). If agency personnel maintain that it is dangerous for the student to be in the current placement (the placement prior to removal to the interim alternative educational setting) during the pendency of [the] due process proceedings, the agency may request an expedited hearing.

7. Protection for children not yet eligible for special education and related services: Students who have not been identified as disabled may be subjected to the same disciplinary measures applied to children without disabilities if the agency did not have prior knowledge of the disability. If the agency is deemed to have knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action, the child may assert any of the protections for students with disabilities in the area of discipline. The agency has knowledge of the disability when:

- the parent has expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) that the student needs special education services; or
- the student's behavior or performance has demonstrated a need for services; or
- the parent has requested an evaluation; or
- the student's teacher or other agency staff have expressed concern about the student's behavior or performance **directly** to the director of special education or other **supervisory** agency staff.

An agency would not be deemed to have knowledge that the child is a child with a disability, if the agency conducted an evaluation and determined that the child was not a child with a disability, or determined that an evaluation was not necessary and provided proper Notice of Action Refused **or, if the parent of the child has not allowed an evaluation of the child pursuant to IDEA or has refused services.**

If a request for evaluation is made during the period the student is subject to disciplinary measures, the evaluation will be expedited. Until the evaluation is completed, the child remains in the educational placement determined by the agency, which can include suspension or expulsion without educational services. If the child is determined to

be a child with a disability, the agency shall provide special education and related services and follow all required procedures for disciplining students with disabilities.

8. Reporting crimes committed by students with disabilities: Agencies reporting crimes, to appropriate law enforcement and judicial authorities, committed by students with disabilities, shall ensure copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

9. Definitions:

- Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 USC 812 (c)).
- Illegal drug means a controlled substance but does not include such a substance that is legally possessed or used under the supervision of a licensed healthcare professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal Law.
- [• **Substantial evidence means beyond a preponderance of the evidence.**]
- Weapon means dangerous weapon as defined under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.
- **Serious Bodily Injury means bodily injury which involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.**

Private School Placement by Parents:

1. Services

To the extent consistent with their number and location in each local agency, provision must be made for participation of private school children with disabilities. However, no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. If your child is designated by the agency to receive special education and related services, the agency must develop a services plan for your child.

To determine which private school children will be designated to receive services, the agency must conduct an annual count of the number of private school children with disabilities. The agency must spend on providing special education and related services to private school children with disabilities an amount that is the same proportion of the IDEA federal funding the agency receives as the number of private school children with disabilities lives in its jurisdiction is to the total number of children with disabilities in its jurisdiction.

2. Limitation on Reimbursement

If you enroll your child in a private school without consent of or referral by the agency, a court or a due process hearing panel may require the agency to reimburse you for the cost of that enrollment if the agency did not offer a free appropriate public education to your child in a timely manner and that the private placement is appropriate. A parent placement may be found to be appropriate by a hearing officer or court even if it does not meet state standards as an approved private agency. However, the amount of reimbursement may be reduced or denied:

- if at the most recent IEP meeting you attended prior to removal of the child you did not inform the IEP team you were rejecting the placement proposed by the agency, and stated your concerns and intent to enroll your child in private school at public expense; OR
- if ten business days (including any holidays that occur on a business day) prior to the removal of your child, you did not give written notice to the agency that you were rejecting the placement proposed by the agency, stated your concerns and intent to enroll your child in private school at public expense.
- if, prior to your removal, the agency provided you a notice of intent to evaluate, but you did not make your child available for such evaluation; OR
- if there has been a court decision that your actions have been unreasonable.

The cost of reimbursement **[may]** **shall** not be reduced or denied for your failure to provide notice prior to removal if:

- [• **you are illiterate and cannot write in English]**
- compliance with the prior notice requirement would likely result in physical **[or serious emotional]** harm to the child.
- the agency prevented you from providing the notice.

- you had not received notice, through the Procedural Safeguards statement, of the prior notice requirement.

The cost of reimbursement may, in the discretion of a court or hearing officer, not be reduced or denied for your failure to provide such notice if:

- **you are illiterate or cannot write in English; or**
- **compliance would likely result in serious harm to the child.**

Due Process Hearing Procedures - Resolution Conference (Optional)

If agreement regarding the identification, evaluation, educational placement or free appropriate public education for your child cannot be reached through discussions, you will be advised in writing of the agency's position which will clearly indicate the action which they propose or refuse to initiate or change. After you receive this notice, you may send a written request to the agency for an informal resolution conference with agency administrators OR you may waive the right to resolution conference and request, in writing, the Missouri Department of Elementary and Secondary Education empower a 3-member hearing panel.

The resolution conference will be conducted and a decision rendered within 10 days of receipt of your request unless you agree to a later time. **[The conference must be held at a time and place that is convenient to you.]** It will be conducted by the agency superintendent or someone designated by the superintendent. The resolution conference is informal. If you waive your right to a resolution conference, and request a 3-member hearing panel by contacting the Missouri Department of Elementary and Secondary Education's Special Education Division in writing, the State will proceed with the empowerment of the panel. During the time period in which the panel is being empowered, the agency has two options: (1) conduct the resolution conference, or (2) waive the resolution conference. If the agency chooses to conduct the resolution conference, despite your waiver of the right to a resolution conference, you will be advised of the agency's finding(s).

At the resolution conference:

- (1) The agency will tell you about and permit you to review all of the information it has about your child.
- (2) The agency will fully explain to you each reason for the action it proposes or refuses.

(3) You or your representative may present any information you have which pertains to the proposed action.

(4) Questioning of witnesses shall be permitted.

Impartial Due Process Hearings - General

You or the agency may initiate a due process hearing at any time you do not agree with any action proposed or refused concerning the identification, evaluation, reevaluation, educational placement or the provision of a free appropriate public education for your child. The Missouri Department of Elementary and Secondary Education shall inform you of any free or low-cost legal and other relevant services available in the area if you request it or if you or the agency initiates a hearing. Except in the case of an expedited hearing stemming from a disciplinary action, the hearing panel must reach its decision and mail a copy of the decision to all parties within 45 days of the date of receipt of request for the due process hearing, unless the chair of the hearing panel grants an extension at the request of either party. In an expedited hearing, the **[process will be completed within 45 days] hearing must be held within 20 school days of the date your request for hearing was filed, and the decision must be rendered and mailed within 10 school days of the hearing.** No extensions are permitted for expedited hearings.

The Missouri Department of Elementary and Secondary Education will provide you a list of the persons who serve as hearing officers, including a statement of the qualifications of each of these persons, upon your request.

During the period of time pending an administrative or judicial proceeding regarding a complaint, the child involved in the complaint must remain in his/her present educational placement, except as provided above under the Discipline section, unless the agency and the parents agree otherwise. If the complaint involves an application for initial admission to public school, the child, with the consent of the parent, must be placed in the public school program until the completion of all proceedings. If the due process hearing decision results in a ruling in favor of the parent on the issue of whether a change of placement is appropriate, that placement must be treated as an agreement between the state or local agency and the parents for purposes of "stay-put."

Impartial Due Process Hearings - Filing requests, mediation rights, hearing rights

If you decide to proceed with the resolution conference and a satisfactory agreement is not reached through the resolution conference conducted by the agency, you or your attorney may appeal to the Missouri Department of Elementary and Secondary Education **Special Education Division** by requesting, in writing, a due process hearing. The written request for a due process hearing can be mailed or faxed to the Missouri Department of Elementary and Secondary Education **and must also be copied and sent to the agency you are initiating due process against:**

MO DESE
P.O. Box 480
Attention: **[Legal] Compliance** Section/Special Education
Jefferson City, MO 65102
Fax: (573) 526-4404

If the hearing request is for an expedited due process hearing based on a discipline action, the request should so indicate. The written request, which shall remain confidential, shall include Notice of: the child's name; the child's address; the name of the school and agency that the child is attending; a description of the nature of the problem including facts relating to such problem; and, your proposed resolution of the problem if known. The Missouri Department of Elementary and Secondary Education has a form you can use to provide this information. To request the form, call the Special Education Division, **[Legal Services] Compliance** Section, at (573) 751-0602, or RELAY MISSOURI 1-800-735-2966 (Telecommunication device for the Deaf). **The due process hearing request shall involve an alleged violation of no more than two years before the date you knew or should have known about the alleged action that is the basis for your hearing request, unless you were prevented from timely filing by specific misrepresentations of the agency that it had resolved the problem or that the agency withheld information from you that you had a right to under IDEA.**

Within 10 days of receiving a copy of your due process hearing request, the local agency must send a response to you that specifically addresses the issues raised in the complaint. [Your right to a due process hearing may not be denied or delayed for failure to provide the required Notice.] If you have waived the resolution conference and wish to proceed directly to a due process hearing, the Missouri Department of Elementary and Secondary Education **(DESE)** will

honor that request, pay the cost of mediation, and follow the procedures explained below:

1. Mediation will be offered to both you and the agency, and if both parties agree to try mediation you will be given a list of trained impartial mediators and must mutually agree upon one. Mediation shall not be used to deny or delay your right to a due process hearing or any other rights under the Individuals with Disabilities Education Act. A mediator is an impartial person who may not be an employee of the agency or any state agency involved in the education or care of the child, and must not have a personal or professional conflict of interest. A person who otherwise qualifies as a mediator is not an employee of an LEA or SEA solely because he or she is paid by the agency to serve as a mediator. The mediator must be knowledgeable in laws and regulations relating to the provision of special education and related services and must be trained in effective mediation techniques.

a. A mediation session will be scheduled within 15 days of the agreement to mediate, held in a location convenient to the parties, and mediation will be completed within 30 days of the agreement to mediate.

b. Both you and the agency have the right to end the mediation at any time.

c. Both you and the agency will receive a copy of the written agreement reached as a result of mediation. **That agreement is a legally binding agreement which states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.**

d. Both you and the agency can each be accompanied by up to three persons. Any additional persons must be by mutual agreement.

e. Neither you nor the agency may bring an attorney to the mediation session.

f. **[Discussions during mediation shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and you and the agency may be required to sign a confidentiality pledge prior to beginning mediation.] Any executed agreement is enforceable in a court of competent jurisdiction.**

2. **Preliminary Meeting/Resolution Session:** The local agency will convene a preliminary meeting with you and relevant members of the IEP team within 15 days of receiving notice of your due process hearing request. The meeting shall include a decision-making representative of the agency. The agency may only have an attorney at the meeting if you bring one, too. At the meeting you can discuss

your complaint and the facts that form the basis of the complaint and the agency will have the opportunity to resolve it. You and the agency may waive the preliminary meeting in writing, or agree to use mediation.

If the local agency does not resolve your complaint to your satisfaction within 30 days of receiving it, the due process hearing may be held. If resolution is reached at the meeting, you and the local agency must sign a legally binding agreement, which is enforceable in a state or federal court of competent jurisdiction. If the parties execute such an agreement, a party may void it within three business days.

[2. Form t] The 3-member panel will be empowered by DESE within 15 days of receipt of your request (or in the case of an expedited due process hearing appoint a hearing officer immediately). One member will be selected by you, one by the agency and one will be selected by the Missouri Department of Elementary and Secondary Education from a list of contract attorneys, and will serve as the Chair. If you do not successfully select your panel member within 10 days, the department will select the panel member. No member of the panel (or in the case of an expedited hearing, no hearing officer):

- a. can have a personal or professional interest which would conflict with his/her objectivity; or
- b. can be an employee of the agency or any state agency involved in the education or care of the child. A person is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

4. Within 15 days of receiving the complaint, the local agency must notify the chairperson of the hearing panel, and you, if it believes your due process hearing request is insufficient. Within five days of receiving such notification, the chairperson must determine if the due process hearing request, on its face, meets IDEA requirements and notify the parties of the decision.

If your hearing request is determined insufficient you can amend it if the local agency consents to such an amendment or the chairperson grants you permission. An amendment can occur no later than five days before a hearing is held. If the request is amended by you, all time-lines recommence and the preliminary meeting requirement is again triggered.

[3.] The panel will have 45 days from the date of the state's receipt of the written due process request to set the date and location of the hearing, give notice to all involved, conduct the hearing and render and mail findings and decision to you and the board of education in writing.

At the 3-member panel, you and the agency both have the right:

(1) to be represented by legal counsel and by individuals with knowledge or training in problems of children with disabilities;

(2) to present evidence, cross-examine witnesses and compel attendance of witnesses;

(3) to prohibit the introduction of evidence, evaluations and recommendations based on the evaluations which have not been disclosed to you at least five business days before the hearing;

(4) to obtain a written or at the option of the parents, electronic verbatim record of the hearing at no cost;

(5) to obtain written, or at the option of the parents, electronic findings of fact and decisions of the hearing (copies, with personally identifiable information deleted, will be provided to the State PL 94-142 Advisory Panel and made available to the public)[.].

Additionally, at the hearing, you have the right:

(1) to have the child present who is the subject of the hearing; and

(2) to open the hearing to the public.

Note: A hearing officer may grant specific extensions of time beyond the periods stated, at the request of either party, except where the case involves an expedited hearing. Each hearing must be conducted at a time and place which are reasonably convenient to the parents and child involved. A hearing officer may bar any party that fails to comply with the requirement to disclose evidence, evaluations and recommendations based on the evaluations within five business days, from introducing such information at the hearing without the consent of the other party.

Civil Action

If you or the agency do not agree with the hearing decision, including decisions rendered in expedited due process hearings pursuant to the Discipline section of this document, you may appeal the findings and decisions in either state or federal court. A hearing decision is final unless a party to the hearing appeals. If an appeal is filed, the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and, based on the

preponderance of the evidence shall grant the relief the court deems appropriate.

The district courts of the United States have jurisdiction of such actions without regard to the amount in controversy.

Before filing a civil action based on the U.S. Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of children with disabilities, due process hearing procedures must be exhausted if the relief sought is also available under the Individuals with Disabilities Education Act (IDEA).

Child Complaints

If you or an organization believes the agency has violated any state or federal regulation implementing IDEA, you or the organization may file a signed, written child complaint with the Missouri Department of Elementary and Secondary Education. The complaint must include a statement that the agency has violated a requirement of IDEA and the facts on which the statement is based. The complaint must allege a violation that occurred not more than one year prior to the date that the complaint was received unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received. Your complaint will be investigated and resolved within 60 days and you will receive a written decision that addresses each allegation in the complaint and contains findings of fact and conclusions and the reason's for the Department's final decision. During the 60 day time-period the Department will conduct an independent on-site investigation if the Department determines necessary, give the complainant an opportunity to submit additional information, either orally or in writing, and review all relevant information and make an independent determination as to whether the public agency is violating IDEA.

The Department will extend the time-line only if exceptional circumstances exist with respect to a particular complaint.

In resolving a complaint in which it has found an agency out of compliance, the Department shall address within its decision how to remediate the compliance violation, including as appropriate, the awarding of monetary reimbursement or other corrective action

appropriate to the needs of the child; and appropriate future provision of services for all children with disabilities. If needed technical assistance activities and negotiations will be undertaken.

If a written complaint is received that is also the subject of a due process hearing or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing.

If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the State must so inform the complainant. A complaint alleging an agency's failure to implement a due process decision must be resolved by the Department.

Attorney's Fees

In any action or proceeding brought under Part B of the IDEA, the court may award reasonable attorneys' fees to the parents or guardians of a child or youth with disabilities who is the prevailing party **or to the educational agency who is a prevailing party, against the attorney of a parent who files a frivolous unreasonable complaint or against the parent or the parent's attorney, if the complaint was pursued for an improper purpose (i.e. to harass, to cause unnecessary delay, to needlessly increase cost of litigation).** IDEA funds may not be used to pay attorneys' fees or costs of a party related to a due process hearing or resulting litigation, even though such funds can be used to conduct such proceedings.

A court award for reasonable attorney's fees is subject to the following:

- (1) The award must be based on prevailing rates in the community in which the action arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fee award.
- (2) Attorney fees and related costs may not be reimbursed for services performed subsequent to the time of a written offer of settlement to a parent if: the offer is made within the time prescribed by the Federal Rules of Civil Procedure, or in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins; the offer is not accepted within 10 days; and the court or hearing officer finds that the relief finally obtained is not

more favorable to the parents than the offer of settlement. However, if the parent prevails and was substantially justified in rejecting the settlement offer an award of attorney fees and related costs may be made.

- (3) Attorney fees may not be awarded related to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action.
- (4) The court may reduce the amount of attorney fees awarded if: the parent **or the parent's attorney** unreasonably protracted the final resolution of the controversy; the amount unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation and experience; the time spent and legal services furnished were excessive considering the nature of the action/proceeding; or, the attorney representing the parent did not provide to the agency the appropriate information in the due process hearing request required by regulation.

NOTE: Attorney fees may not be reduced if the court finds the state or local agency unreasonably protracted the final resolution, or there was a violation of the Procedural Safeguards.

This information regarding procedural safeguards has been compiled from the Individuals with Disabilities Education Act (IDEA), the Missouri State Plan for Special Education, your local agency's Compliance Plan for Special Education, and the Family Educational Rights and Privacy Act of 1974 (FERPA).

Missouri Department of Elementary and Secondary Education
July 2005

IDEA 2004 Revisions

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Additional information about your procedural safeguards can be obtained from the following:

**Missouri Department of Elementary and
Secondary Education Compliance Section:**
Fax (573) 526-5946 • TDD 1-800-735-2966
Compliance Section (573) 751-0699

Missouri Parents Act (MPACT)
816-531-7070
800-743-7634 (voice/TDD)
Fax (816) 531-4777